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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 462

ALAN B. KUPER and VIRGINIA A. KUPER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Prefatory Statement

Rule 19 of the Revised Rules of the Supreme Court contains the clear implication that writs of *certiorari* will be most sparingly granted and, then, only in cases where it is manifest that resolution of the issues presented will significantly benefit the administration of justice. Confronted with the burden of satisfying so demanding a standard, a petitioner should be entitled, at the very least, to have the issues and authorities relied upon (*pro* and *contra*) fairly and clearly stated to this Court. This reply is being filed in an endeavor to restore clarity along these lines by correcting several potentially misleading assertions injected into the case by respondent's brief in opposition.

I

The Commissioner denies the existence of a conflict between this case and *Seasongood* v. *Commissioner*, 227 F. 2d 907 (6th Cir. 1955), relying upon a claimed factual distinction between the two cases. Specifically, he asserts that in *Seasongood* less than five per cent of time and effort was devoted to influencing legislation, whereas here a substantial portion of the Millburn League's activities was found to consist of attempts to influence legislation. [Resp. Br. 6-7]. In so arguing, the Commissioner ignores the fact, as found by the Court below, that "an *insignificant part*, measured by woman hours', of the activities of the [Millburn] League consists of * * * direct efforts to influence legislation". [Pet. A18]. Only by means of tacking on to such minuscule activities the substantial amount of time spent by Millburn League members in *study* and *discussion* was the Court below able to reach the conclusion that these two activities were substantial *in the aggregate*, and, further, that both activities should be considered influencing legislation. Factually, the cases are on all fours

It was the Court's refusal, in *Sagasongood*, to aggregate the substantial study and discussion activities of the Hamilton League with its (5%) direct legislative activities, which creates the square conflict upon which the taxpayers rely in support of this petition.

II

One of the questions being pressed here, but summarily passed over below, is whether the League of Women Voters is an "action" organization within the meaning of the Commissioner's regulations. [Pet. 9-12; A19]. The Commissioner acknowledges the pertinence of Treasury Regulations, § 1.501(c) (3)-(1)(c) (3) and its several subdivisions. [Resp. Br. 7-8]. However, he speculates that the Court of Appeals, in refusing to go into the matter *may* (tacitly) have agreed with the Commissioner's contention that the League is an action organization under subdivision (ii). [Resp. Br. 7-8]. However, as was fully and clearly demonstrated in the petition, the League is *not* an action organization either under subdivision (ii) or any other subdivision. [Pet. 10-12]. The Commissioner's speculations in this regard amount to something less than unsupported *ipse dixit*, having little relevance to the granting or denial of the writ. However, a more serious vice and gross misapplication of the regulations inheres in the following statement contained in the Commissioner's brief [Resp. Br. 8]:

> Furthermore, Section 1.501(c) (3)-1(c) of the Regulations (Appendix, *infra*, p. 12) expressly provides that an organization will not be regarded as operated exclusively for one or more exempt purposes "if more than an insubstantial part of its activities is not in furtherance of an exempt purpose." Since influencing legislation is not an exempt purpose, the Treasury

> Regulations are entirely consistent with the provisions of Section 170 (c) (2) of the 1954 Code, which provides in effect that deduction of charitable contributions is allowed on the condition, *inter alia*, that no substantial part of the donee organization's activities is attempting to influence legislation.

Of course, "influencing legislation" is not an exempt purpose! But how unfair and misleading it is for the Commissioner, in applying the quoted portion of the regulations, to ignore the facts, found by both Courts below, that the League of Women Voters *did* have as its basic and primary purpose, an exempt purpose, namely, "education", and that the legislative activity carried on by the League—the question of its substantiality aside—*was* in furtherance of such primary, exempt purpose. [Pet. A2, A5, A14, A15, A19]. Thus, it is clear that the League *does satisfy* the requirement of §1.501(c) (3)-1(c), that the legislative activity of an organization be in furtherance of an exempt purpose, such as education, in order to avoid classification as an action organization.

III

The Commissioner's reliance on *Slee* v. *Commissioner*, 42 F. 2d 184 (2d Cir. 1930), aff'g 15 B. T. A. 710 (1929), as a controlling case [Resp. Br. 5] is misplaced for both factual and legal reasons. There, the taxpayer made annual contributions to the American Birth Control League, an expressed primary aim of which was:

> Political and Legislative: To enlist the support and cooperation of legal advisors, statesmen and legislators in effecting the removal of state and federal statutes which encourage dysgenic breeding, increase the sum total of disease, misery and poverty and prevent the establishment of a policy of national health and strength. [15 B. T. A. 713].

It is clear from the opinions of the Board of Tax Appeals and of the Second Circuit that the American Birth Control League did not look on both sides of the question of birth control before taking a position. It *started* with a position and bent all its efforts thereafter towards legislative change in accord with its original purpose.

By way of marked contrast to the *Slee* case, the record here establishes conclusively, and, indeed, the trial Judge found that the Millburn League "is basically an educational organization devoted to fostering an intelligent participation of women in public affairs at all levels of government" [Pet. A2]; that the Millburn League "has studied *various* issues facing *all levels of government*" [Pet. A2]; and that "although the purpose of the League of Women Voters is *not* to accomplish particular legislative action [Pet. A5], it does, after study and discussion *of all sides*, often take positions leading to legislative action. [A3, A6] [Emphasis added].

The foregoing factual findings place the Millburn League squarely outside the category of an action organization as described in Regulations §1.501(c) (3)-1(c)-(3) (iv). [Pet. 10-11, fn. 12] whereas the Birth Control League in *Slee* falls squarely within such category.

In addition to the sharp factual distinction between this case and *Slee* v. *Commissioner*, *supra*, there is a clear and important legal reason why the *Slee* case does not control here. *Slee* v. *Commissioner*, *supra*, involved the taxable years 1921-1926. It was decided in 1930. Prior to the enactment of the Revenue Act in 1934, the requirement that a contribution be made to an organization operated "exclusively" for educational purposes had been strictly construed. However, the Revenue Act of 1934 liberalized the interpretation of the word exclusively" by adding the so-called "substantiality" test. The latter change was for

the purpose of permitting organizations to engage in some of the previously barred non-educational activities without losing their status as exempt organizations to which contributions are deductible. In *Seasongood* v. *Commissioner*, *supra*, 910, the Court stated:

> * * * Prior to 1934, the section did not include the language "and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation," this being written into the law in the Revenue Act of 1934. It seems clear, therefore, in the light of the amended section, that the term "exclusively" is given a connotation differing from the ordinary meaning of that term, as originally used, and activities which are minor, and not substantial, do not disqualify charitable or educational corporations from the benefits of the exemption nor do they disqualify individual contributors to such corporations from deducting them in their income tax returns. The Courts have so held. They have also applied the principle, that the section being remedial must be liberally construed.

The facts of *Slee* and the legal climate then existing having differed in so many material respects from the facts and law of this case, Judge HAND's comments, valid when uttered, can hardly be said to apply here.

CONCLUSION

It is respectfully submitted that this Court in the exercise of its sound judicial discretion should grant the petition.

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